

Service Date: December 22, 2006

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

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In the Matter of Montana Sky's Trucking)	TRANSPORTATION DIVISION
Inc., PSC No. 304, Complaint)	DOCKET NO. T-06.17.COM
by Suhr Transport)	ORDER NO. 6790a

In the Matter of the Application to Transfer)	TRANSPORTATION DIVISION
PSC No. 304)	DOCKET NO. T-06.12.ST
		ORDER NO. 6791a

ORDER ON RECONSIDERATION
ORDER ON MOTION FOR STAY

INTRODUCTION AND BACKGROUND

On November 24, 2006 the Commission issued Order Nos. 6790 and 6791 in these dockets. In Order No. 6790 the Commission declined to revoke PSC No. 304, owned by Montana Sky's Trucking (MST), on the Complaint of Suhr Transport (Suhr). In Order No. 6791 the Commission lifted the suspension/stay of transfer Docket No. T-06.12.ST - involving an application for sale/transfer of PSC No. 304 - allowing the sale/transfer process in that docket to go forward. On December 7, 2006, after receiving an extension of time, Suhr filed a Motion for Reconsideration of Order No. 6790; and a Motion for Stay of Docket No. T-06.12.ST, effectively a Motion for Reconsideration of Order No. 6791. The Commission here addresses both motions.

MOTION FOR RECONSIDERATION OF ORDER NO. 6790

Suhr asserts it was error for the Commission to "promulgate a rule, such as ARM 38.3.602, and then choose to only enforce part of the rule"; and states, "Selective enforcement of duly promulgated rules constitutes an error of law" Motion, pp. 2-3. This misstates the facts, as explained at page 5 of Order No. 6790. The Commission did not choose to not enforce, nor did it choose to enforce selectively. Rather, the Commission overlooked the rule; in effect was

unaware of and not conscious of the rule. There was no decision not to enforce, nor a decision to enforce selectively. There simply was no decision.¹

The point was made implicitly in Order No. 6790, and is made explicitly here, that the Commission has a general obligation to implement its rules, or to repeal them. There was a failure to meet that obligation in this instance. The Commission found, and finds that it would be inequitable to make MST the victim of that failure. The corrective to the Commission oversight is prospective, and at Order No. 6790. The Commission states it will evaluate the rule and either implement it or repeal it.

Suhr also contends that the Commission had no discretion as to whether to enforce ARM 38.3.602((1)(b)). Suhr notes that the rule reads, "fail[ure] to... begin actual operations within the required time period... will result in the revocation of the... certificate...." The Commission has explained the basis for its finding that it is not required to revoke PSC No. 304, despite the language of the rule. Order No. 6790, pp. 5-6. In addition, the Commission finds that in this instance it is not bound by its own rule.

Generally, administrative agencies are bound by their own rules. See e.g., Am. Jur. 2nd, Administrative Law, §§ 236, 241; C.J.S. Public Administrative Law and Practice, § 174; Davis and Pierce, Administrative Law Treatise, 3d ed. § 6.5 (1994); Koch, Administrative Law and Practice, 2d ed., § 4.22 (1997); Westlaw Key system, Administrative Law, Key 416.1; (As far as the Commission is aware the Montana Supreme Court has not had occasion to express itself on this principle of law.) However, there are exceptions, and an agency is not required to follow its own rule if it can provide "a rational explanation for [the] departure." Utahns v. US DOT, 305 F.3d 1152, 1165 (10th Circ. 2002). The Commission has provided such an explanation, here and in Order No. 6790. Cf. Waste Management Partners v. Public Service Commission, 284 Mont. 245, 257 (1997) ("It is a well-established principle of agency law that an agency has a duty to either follow its own precedent or provide a reasoned analysis explaining its departure.")

Section 1-2-102, MCA, stating a particular intent governs a general intent for purposes of statutory construction, is not relevant to this issue. There is not a particular statutory intent to contrast to a general statutory intent with respect to whether PSC NO. 304 must be revoked.

¹ It is the case that individual Commission staff persons were aware of the rule in question. But that awareness did not lead to any Commission discussion of the rule, nor to any relevant staff discussion related to enforcement of the rule. Such discussion has occurred subsequent to the filing of the Suhr Complaint.

The particular law that Suhr relies on to support its contention that PSC No. 304 must be revoked is an administrative rule - ARM 38.3.602(1)(b). To the extent that there is general statutory authority that contradicts this rule, the statutory law controls. However, even if, arguendo, the specific rule controls the general statute, the Commission finds that its discretion is firmly anchored in the law that gives it latitude, under certain circumstances, to not observe its own rules.

Another basis for declining to revoke PSC No. 304 and dismissing the Suhr Complaint on the alleged violation of ARM 38.3.602(1)(b), not discussed in Final Order No. 6790, is that the Suhr Complaint violates the relevant statute of limitations. In this regard the Commission follows its own precedent at In the Matter of Mackenzie Disposal, Inc. and WWSS Associates, PSC 9265, Complaint by Montana Solid Waste Contractors and Browning-Ferris Waste systems of Montana, Docket No. T-00.4. COM, Final Order No. 6492d, October 14, 2004, ¶¶ 17-31. The relevant limitation period for the Suhr Complaint on the rule violation is three years. Suhr's Complaint was filed well after that period expired. A statute of limitations for these purposes is jurisdictional; and, therefore, with respect to the rule violation, the Complaint must be dismissed.

CONCLUSIONS OF LAW

The Commission affirms and adopts by reference Conclusions of Law Nos. 2-5 at Order No. 6790. Conclusion of Law No. 1 at Order No. 6790 is deleted and replaced as follows: "To the extent it complies with the relevant statute of limitations, the Commission has jurisdiction over the Complaint of Suhr Transport in Docket No. T-06.17.COM. § 69-12-210(1), MCA." In addition, the Commission concludes:

1. Section 27-2-202(3), MCA, is the relevant statute of limitations for purposes of claiming a violation of ARM 38.3.602(1)(b);
2. Failure to file a complaint within the relevant statute of limitations period removes Commission jurisdiction over the complaint;
3. The Complaint of Suhr Transport that MST violated ARM 38.3.602(1)(b) was not timely filed and the Commission has no jurisdiction over it.

ORDER

The Commission adopts and affirms its ORDER at Order No. 6790, for the reasons stated here and at that Order. The Suhr Complaint regarding ARM 38.3.602(1)(b) is dismissed for the reasons stated here. Suhr's Motion for Reconsideration is denied. Suhr's Motion for Stay of Docket No. T-06.12.ST (Reconsideration of Order No. 6791) is denied, as moot. The transfer of PSC No. 304 in Docket No. T-06.12.ST is approved.

THE FOREGOING ORDER was adopted by the Department of Public Service Regulation of the State of Montana, Public Service Commission, IN OPEN SESSION at Helena, Montana, this 19th day of December, by a vote of 5 to 0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

GREG JERGESON, Chairman

BRAD MOLNAR, Vice Chairman

DOUG MOOD, Commissioner

ROBERT H. RANEY, Commissioner

THOMAS J. SCHNEIDER, Commissioner

ATTEST:

Connie Jones
Commission Secretary

(SEAL)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Order on Reconsideration – Order on Motion for Stay issued in Docket T-06.17.COM and Docket T-06.12.ST in the matter of Montana Sky's Trucking, Inc., PSC No. 304, Complaint by Suhr Transport and Application to Transfer PSC No. 304 has today been sent to all parties listed.

MAILING DATE: December 22, 2006

FOR THE COMMISSION

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